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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 579

THE UNITED STATES, PETITIONER

v.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF DELAWARE, AND W. E. ALBERT, RECEIVER OF THE IOWA-WISCONSIN BRIDGE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered in this case on July 11, 1949, by the United States Court of Claims.

OPINIONS BELOW

The opinions in the Court of Claims (R. 36–38) are reported at 84 F. Supp. 852.

JURISDICTION

The judgment of the Court of Claims was entered on July 11, 1949 (R. 58). A motion for new trial was denied on November 7, 1949 (R. 58–59). Jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

In the vicinity of the respondent's bridge property, the Mississippi River, which in a state of nature was a navigable waterway of the United States, surrounds islands with its several channels, and only one of such channels is improved and maintained by the United States for commercial navigation.

The question presented is whether, upon the choice of a main channel, the navigation servitude over the entire river is continued or is relinquished over the other channels, unless such channels are separately proven to be navigable.

STATEMENT

This is an action to recover for an alleged taking resulting from damage to a toll bridge property by reason of the Government's establishment and operation of Lock and Dam No. 9 in the Mississippi River, about 205 miles below Minneapolis.

Lock and Dam No. 9 is one of a series of navigation dams constructed in the Mississippi River to create a nine-foot channel between the mouth of the Illinois River and the Twin City Dam, as directed by Congress in the Act of July 3, 1930, c. 847, 46 Stat. 918, 927 (Fdg. 11, R. 21).

About 15 miles up river from Lock and Dam No. 9, the respondent operated a toll bridge and road traversing the Mississippi River and bottom lands from Lansing, Iowa, to a point near De-

Soto, Wisconsin, a distance of about 2¾ miles (Fdg. 7, R. 19; Fdg. 11, R. 21; Map, Appendix A, R. 60).

The toll bridge and road went into operation in June 1931 (Fdg. 6, R. 19). Lock and Dam No. 9 was completed, and, on April 18, 1938, the pool of the dam was filled for the first time raising the level of the river to elevation 620, which was about 3½ feet above ordinary high-water mark at the toll bridge and road (Fdg. 11, R. 21; Fdg. 8, R. 20).

The respondent's property consisted of a high steel span across the main channel of the Mississippi and a dike roadway about 2½ miles long through the bottom lands. This roadway was intersected by five sloughs or channels. Wooden trestle bridges connected the roadway at these intersections. In addition, there were approaches from the mainland at each end of the property. (Fdg. 7, R. 19–20.)

The Court of Claims held the Government liable for damages resulting from maintenance of pool elevation 620. It granted judgment for $84,375, plus interest at 4 percent from April 18, 1938, as representing the sum necessary "to enable plaintiff to meet and overcome the servitude placed upon the property by reason of defendant's construction and operation of Lock and Dam No. 9." Included in the judgment was $35,000 representing the cost of rebuilding the wooden bridges built on trestles in the beds of

two of the five sloughs, namely Big Slough and Winneshiek Slough "with steel spans and supporting piers." (Fdg. 36, R. 35–36.)[1] These two bridges, the court found, had been damaged by reason of scouring in the beds of the sloughs around the supporting timbers or piers, coupled with the pressure of the increased quantity of ice coming down the sloughs which forced the bridges out in March 1945, seven years after the dam went into operation (Fdg. 25 and 26; R. 27). The judgment also included an additional $2,000 for rebuilding land barriers to provide protection to the bridge abutments under the conditions created by Lock and Dam No. 9 (Fdg. 36, R. 36; Fdg. 19, R. 25).

The Government took the position that the two sloughs traversed by the wooden bridges, with respect to which $35,000 in damages was allowed, were a part of the Mississippi River, a navigable waterway of the United States; it contended that since the bridges were in and over these navigable waters, any damage to them resulting from navigation improvements was not compensable. This same contention applied to the $2,000 allowed for rebuilding the land barriers since they would be as much a part of the bridges as the abutments the proposed barriers would protect. The Court of Claims, Judge Whitaker dissenting (R. 55–58),

[1] Of the remaining three sloughs, one was filled in (Fdg. 7, R. 20) and no claim was made, and nothing was allowed for the wooden bridges across the other two sloughs.

avoided the Government's contention by limiting the Mississippi River to the channel maintained by the United States for commercial navigation, and treated the channels traversed by the two wooden bridges as if they were independent watercourses. On that basis, the court found them to be nonnavigable (Fdg. 6, R. 19; Fdg. 13, R. 22–23).

REASONS FOR GRANTING THE WRIT

1. In *United States* v. *Chicago, M., St. P. & P. R. Co.,* 312 U. S. 592, 595–597, this Court held that the navigation servitude extended to the entire bed of the Mississippi and refused to adopt the view that the servitude was limited to the portion used for actual navigation. In the present case, the Court of Claims took a different road to arrive at the conclusion rejected by this Court in that case. It held that the navigation servitude was limited to the main channel marked, maintained and used by actual navigation. This it did by ruling that the Mississippi River consisted solely of the main channel, 1,200 feet wide (Fdg. 6, R. 19). It did not explain why it separated the main channel from the side channels of the same river. It simply dealt with the side channels, Winneshiek Slough and Big Slough, just as if they were independent watercourses entirely unrelated to the Mississippi River, and proceeded to test those channels for navigability as though they were separate waterways of the

United States. On that basis, it denied the United States its navigation servitude over those two channels, solely on the ground that the channels were not navigable in fact (Fdg. 13, R. 22–23).

In so limiting the navigation servitude, the court below announces a novel doctrine. The Mississippi River is navigable and the navigation servitude extends to the entire bed of the River. *United States* v. *Chicago, M., St. P. & P. R. Co.,* 312 U. S. 592, 597. If Winneshiek Slough and Big Slough are waters of the Mississippi, the United States is not liable for damage to the two wooden bridges in and across those sloughs, resulting from the improvement of navigation. Persons placing structures over a navigable stream must "suffer the consequences of the improvement of navigation." *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 70. See also *United States* v. *Chicago, M., St. P. & P. R. Co.,* 312 U. S. 592, 599. Cr. *Union Bridge Co.* v. *United States,* 204 U. S. 364, 389, 399, 400; *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177, 186, 193–194; *Hannibal Bridge Co.* v. *United States,* 221 U. S. 194, 199, 206–208; *Louisville Bridge Co.* v. *United States,* 242 U. S. 409, 420–421.

But the court below limits the sovereign power to regulate commerce by confining it to the particular channel of the river being maintained for

navigation at the time the damage occurred. This result is arrived at on the Court of Claims' view of the controlling legal principle—that navigability in fact of each channel is the test and the relationship among the channels irrelevant. But cf. *United States* v. *Turner,* 175 F. 2d 644, 647 (C. A. 5), certiorari denied, 338 U. S. 851 ("no distinction upon the ground of navigability between the shallows and depths of navigable waters"). The effect of the decision below is that where the Government elects to improve one of several channels of a navigable river, the channel selected for improvement becomes the navigable river, and the remaining channels are released from the paramount navigation servitude unless they are independently proven to be navigable. In other words, upon the first exercise of the servitude, the sovereign right to improve the river became restricted to the particular channel improved, and the Government automatically surrendered the superior navigation servitude theretofore existing as to all the other channels unless it could prove that each of those channels taken by itself was navigable. That is simply another way of saying that the navigation servitude exists only as to the portion of the river actually improved, and that the Government is liable for resulting damages to structures in portions of the bed of the river outside of the improved area. That concept, as

we have seen, was rejected by this Court in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 595–597.[2]

In his dissenting opinion, Judge Whitaker followed the concept accepted by this Court in *United States* v. *Chicago, M., St. P. & P. R. Co., supra,* when he stated (R. 57): "If the Government is immune from liability for damage to a structure erected in the main channel, it must necessarily follow on principle that it is immune from liability for damage to a structure erected over one of the other channels." The error of the court below becomes clear when its holding is applied to a situation where a small island (compared to the size of the river) divides the river into two channels, a deep one and a shallow one, or a wide one and a narrow one. In such a case, each channel is part of the river and the

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[2] The decisions relied upon by the Court of Claims do not, in fact, support its judgment (R. 53, note 6). For present purposes, we need briefly consider only the two decisions of this Court that are cited. In *Leovy* v. *United States*, 177 U. S. 621, the watercourse involved, Red Pass, was not a channel of a navigable river. It was an independent waterway which branched off from the Jump, which, in turn, branched off from the Mississippi. Neither Red Pass nor the Jump returned to the Mississippi, but flowed, instead, into the Gulf of Mexico.

In *Healy* v. *Joliet & Chicago Railroad Co.*, 116 U. S. 191, affirming 94 Ill. 416, no question was involved of definition of a river and the relationship between one channel and another. The only question was whether navigability in fact of a particular waterway had been decided in accord with proper principles.

requirement of an independent testing of the smaller channel for navigability is insupportable. Yet no different legal question is here presented simply because there is more than one island or because some of the islands are relatively large.

The situation here is no different in principle than that present in *South Carolina* v. *Georgia,* 93 U. S. 4. In that case, this Court, in dealing with the Government's power to improve the Savannah River at a point where it was divided into two channels by an island about six miles long and one mile wide (p. 6), stated (p. 11):

> *The two channels are not two rivers,* and closing one for the improvement of the other is in no just or legal sense destroying or impeding the navigation. [Emphasis supplied.]

2. The conclusion arrived at by the Court of Claims is without support in reason. The Mississippi River is one of the great navigable watercourses of the United States.[3] In the course of the hundreds of miles of its navigable length, there are numerous islands of varying size. These islands form obstructions to the flow. As the river approaches such obstructions it divides into two or three or more channels. Such a situation is present in the stretch of the river in suit, just as it is present in innumerable places in the

[3] For a history of the discovery of the Mississippi and navigation on the Mississippi, see Dictionary of American History, Vol. III, pp. 422–424, 425–426.

river above and below the place in suit. (See pp. 11–12, *infra*).

A little upstream from the Bridge Company property, the river splits into several channels which meander through the bottom lands and reunite downstream. For purposes of this petition, we need be concerned with only three channels—the main channel, maintained for commercial navigation, which the court below labeled "Mississippi River," and two secondary channels, Winneshiek Slough and Big Slough.

The course of the river and its various channels in the vicinity of the bridge property before the construction of Lock and Dam No. 9 is shown on the map incorporated as a part of the findings of the court below as Appendix A (Fdg. 13, R. 23, Appendix A, R. 60. See original made a part of the record). Even casual observation makes plain that the side channels, Winneshiek and Big Sloughs, are a part of the river. They carry a portion of the total flow. They have neither independent sources nor contributing sidestreams. They stem from the main channel of the river and return to the main channel (Fdg. 13, R. 22–23). Moreover, these side channels are not mere rivulets. They are substantial watercourses. At the time the respondents sought permission of the Secretary of War to construct the wooden bridges across the side channels, and in 1931, at the time the bridges were constructed,

Big Slough was 148 feet wide and Winneshiek Slough was 250 feet wide (Fdgs. 5, 7, R. 19, 20).

Before any improvement work was done, the United States could have selected any of the channels of the river for deepening or widening for navigation purposes. It elected to improve what is now the main channel and maintained first a 4½-foot and later a 6-foot depth in the area in suit, mainly through the use of wing dams and closing dams placed at the heads of the sloughs so as to direct sufficient of the flow into the channel to be improved to maintain the desired depth. House Doc. No. 341, 59th Cong., 2d sess. (1906), p. 8 (area in suit between Winona and Wisconsin River). In this fashion, prior to the construction of Lock and Dam No. 9, some of the water from Big Slough and Winneshiek Slough had been diverted into the channel improved for navigation (Fdgs. 13, 23, R. 22, 23, 26). The Government might have selected Winneshiek or Big Slough for development as the navigation channel, at the expense of what is now the main channel. In other words each of these channels, prior to the improvement of any of them, was a part of the navigable Mississippi and therefore subject to the navigation servitude.

In its finding relating to the portion of the river at the site of Lock and Dam No. 9, the Court of Claims itself recognized that the Mississippi River includes all of its channels, not merely the channel actually used for navigation (Fdg. 11, R.

21). At the dam site (shown near the bottom of the map, Appendix A, R. 60), the river is divided by islands into a main channel and a number of side channels which are designated on the map as sloughs. However, the court below did not define the Mississippi River at this point, as confined to the channel maintained for navigation. It found that the lock and dam "straddles the river from shore to shore" and that the structure consisted of a lock and concrete dam "all in the *main channel,* then an earthen section 9,300 feet long, extending from the west end of the concrete dam to the opposite side of the river valley." (Emphasis supplied.) In specifying the number of gates in the dam the court again found the concrete dam to be "in the main channel" (Fdg. 11, R. 21).

If the Mississippi River embraces the main channel and the side channels at the point where Lock and Dam No. 9 is located, it embraces the main channel and side channels in the vicinity of the respondent's property.[4] As explained in the dissenting opinion below "if the level of the water in the main channel is raised, then the level of the water in the other channels is necessarily

[4] Cf. Finding III of the Court of Claims set out in *Gibson v. United States*, 166 U. S. 269, which related to a point in the Ohio River where an island divided the river into two channels. The finding distinguished between the "north, or main navigable, channel of the Ohio River" and "the south channel of said Ohio River, which is not navigable."

raised, unless steps are taken to prevent the water from flowing down them at all" (R. 57).

3. This case presents a question of great general importance. The decision below results in a grave impairment of the sovereign constitutional power to regulate commerce. It establishes a new legal concept of what constitutes a navigable river, and thereby narrows the navigation servitude by confining it to the single channel marked for improvement. This case does not present an isolated or peculiar fact situation. There are hundreds, if not thousands, of instances where the great rivers of this country divide into multiple channels by reason of islands in the path of flow.[5] As a practical matter, it is difficult to conceive of an improvement affecting the water level of one channel of a navigable river which will not affect the other channels. The effect of the decision be-

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[5] For example, see maps of the various surveys of the Mississippi River made by the War Department.

1. Surveys made in 1866, 1867, 1868 and 1869, House Ex. Doc. No. 1, pt. 2, 45th Cong., 3d sess. (1878); account of surveys, vol. 4, pp. 1094–1125, list and description of maps of survey, pp. 1113–1123, Map M. 152 and Map M. 217 in the National Archives, Records of the Office of the Chief of Engineers.

2. Surveys made in 1878 and 1879, House Ex. Doc. No. 1, pt. 2, 46th Cong., 3d sess. (1880), Vol. 4, pp. 1514–1525; Map M. 245 and Map M. 221 in the National Archives, Records of the Chief of Engineers.

3. Map of the Upper Mississippi River from the mouth of the Ohio River to Minneapolis, Minnesota, National Archives, Records of the War Department, Office of the Chief of Engineers, the Mississippi River Commission R. G. 77.

low is that those channels which are not in themselves navigable in fact, would no longer be within the regulatory powers of Congress. *E. g.,* Act of March 3, 1899, c. 425, secs. 9, 10, 30 Stat. 1151, 33 U. S. C. 401, 403; General Bridge Act of August 2, 1946, c. 753, Title V, 60 Stat. 847 as amended, 33 U. S. C. 525–533. It follows that if the decision below stands, the navigation servitude will be greatly narrowed, the regulatory powers of the United States will be seriously diminished and the Government will be subjected to substantially increased costs.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General

FEBRUARY 1950.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 579.

THE UNITED STATES, PETITIONER,

v.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF DELAWARE, and W. E. ALBERT, RECEIVER OF THE IOWA-WISCONSIN BRIDGE COMPANY, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF OF RESPONDENTS.

FRED A. ONTJES,
Counsel for Respondents.

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BRIEF OF RESPONDENTS IN OPPOSITION.

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The opinions in the Court of Claims (R. 36-58) are reported at 84 F. Supp. 852.

JURISDICTION.

The judgment of the Court of Claims was entered on July 11, 1949 (R. 58). A motion for new trial was denied on November 7, 1949 (R. 58-59). Jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED.

The question stated on page 2 of the petition is prefaced with an erroneous fact statement that the Mississippi River in the vicinity of respondent's bridge property surrounds several islands with channels, one of which is improved and maintained by the United States for commercial navigation. No record citation is given and the statement is contra to the record. The question then stated is based on the assumption of the correctness of the erroneous fact statement.

The question presented is whether Big Slough and Wineshiek Slough which run across the valley lands and crossed the bridge company's right of way some distance from the Mississippi River and which have never served any commercial or travel purposes and there being no evidence that they are capable of being so used, are navigable (Fdg. 6, R. 19; Fdg. 13, R. 22-23).

STATEMENT OF CASE.

Petitioner's statement (pages 2-5 of the Petition) is inaccurate and incomplete and so skeltonized that it does not reflect the case as it was before the Court of Claims, and is not supported by the Findings of Fact.

The petition, page 2, asserts that the action is to recover for "alleged taking resulting from damage." That is not correct. This is an action for the recovery of compensation for the taking of and injury done to the Bridge Company's property by the construction and operation by the Government of Lock and Dam No. 9 in the Mississippi River, 15.5 miles down stream from the Bridge Company's property. The Court of Claims found that there was a taking of and injury to the Bridge Company's property and awarded just compensation (Court's Findings 1 to 35, inc., R. 18-36; Court's Opinion R. 36-55, particularly bottom R. 40 and R. 41).

The petition omits stating that in 1928 Congress authorized the corporate predecessor of respondent Bridge Company to construct, maintain and operate a bridge and approaches thereto across the Mississippi River at or near Lansing, Iowa (Fdgs. 1-5, R. 18-19).

The second full paragraph on page 3 of the Petition is inaccurate and incomplete and should be corrected to read as follows: At the site of the steel bridge, the Mississippi River is approximately 1200 feet wide from bank to bank, and the steel bridge is approximately 1600 feet long. Between the east bank of the Mississippi River and a point opposite near DeSoto, Wisconsin, there lay, in state of nature, an expanse of valley or bottom land cut by various sloughs, including Winneshiek Slough and Big Slough (Fdg. 6, R. 19).

The Bridge Company's property consists of (1) an approach leading from the town of Lansing, Iowa to the Mississippi River, (2) a high steel fixed span across the Mississippi River, and (3) a roadway or dike leading eastward from the east end of the steel bridge on the Wisconsin side. The roadway and approach on the Wisconsin side extends easterly approximately 2½ miles from the east bank of the Mississippi River to a point near DeSoto, Wisconsin. It consists of a road on a raised earthen embankment or dike, with trestle bridges traversing the several sloughs between the Mississippi River and a point near DeSoto, Wisconsin, two of which are Big Slough and Winneshiek Slough (Fdg. 7, R. 19-20).

The lands crossed by the Bridge Company's roadway and trestle bridges are part of lands which were patented by the United States to the State of Wisconsin and to individuals, respondent's predecessors in title (Fdg. 13, R. 22).

The Court found: "Big Slough starts with an opening on the Mississippi River just above Lansing. It crosses the Bridge Company's right-of-way about 1,000 feet south of its opening and then divides into three branches. One

branch winds an irregular course to reenter the Mississippi River about 2½ miles down the river. The second branch winds north and then south into LaFayette Slough. The third branch winds its way back to the Mississippi River at a point slightly south of where the first branch reenters the river. A closing dam of stone and brush and having an elevation of approximately 618 feet, had been constructed by the United States across the entrance to Big Slough. On rare occasions a small row boat has been seen in the slough. The slough contains no dock or landing place and the land through which it winds is not agricultural land. There is no industry in the vicinity. It has never been used for any commercial purpose and there is no evidence that it is capable of being so used. Big Slough is not in fact navigable.

"Winneshiek Slough commences at the Mississippi River with two entrances on the river, one about a mile north of the Bridge Company's property, and the other about 2 miles north of the property. The entrances join above the Bridge Company's property and near the railroad embankment, flowing in a southeasterly direction across plaintiff's right-of-way and thence southwest for about two miles. From that point on the slough divides several times into branches which wind in various directions and eventually return to the Mississippi River. As in the case of Big Slough, a closing dam constructed by the Government blocks the entrances from the river and no boats except an occasional small row boat have been seen in the slough. It has never been used for the purpose of travel or commerce and no evidence was introduced to indicate its susceptibility for such use. Winneshiek Slough is not in fact navigable.

"Defendant's Exhibit 27, being a map of the area in question, has been reproduced in part, and is attached hereto and made a part hereof, as Appendix A (Fdg. 13, R. 22-23)."

Ordinary high-water stages at the site of the Bridge Company's project was 616.5 (Fdg. 8, R. 20). The dam is operated to maintain project pool level 620 above sea

level at Lansing. When the dam is in operation the elevation of the pool at Lansing often exceeds 620 from a few inches to as much as a foot (Fdg. 11, R. 21). The pool of the dam extends back 30 miles to Lock and Dam No. 8 at Genoa, Wisconsin. The toll bridge and road in controversy are located at Lansing, Iowa, about midway in the pool of Dam No. 9 (Fdg. 11, R. 22). A part of the Bridge Company's property consisted of wooden trestle bridges across Winneshiek and Big Sloughs. The decks or floors of these bridges rested on a series of pile bents, seven piles to the bent. In March 1945 the pressure of accumulated ice against the trestle work forced out a number of trestles of each bridge, carrying with it portions of the deck or floor (Fdg. 21, R. 26). Prior to maintenance of pool level 620 the Bridge Company's bridges were adequate to withstand the action of ice coming down the sloughs (Fdgs. 22, 23, 24, R. 26-27). After the pool was raised to and maintained at elevation 620, a much greater area of water surface was created upstream from the bridges since all the land therein lying below elevation 620 and above elevation 616.5 (previous ordinary high-water mark) was now permanently inundated (Fdg. 25, R. 27). The forcing out of the Bridge Company's trestle bridges in March 1945 was due to the ice conditions created by the maintenance of pool level at elevation 620 by the Government (Fdgs. 26-27, R. 27-28). The Court of Claims awarded compensation as to the bridges in the amount of $35,000 as of April 18, 1938 (Fdg. 28, R. 28; Fdg. 36, R. 35-36).

On page 3 of the petition, the last paragraph, it is stated, "held the Government liable for damages." That is incorrect. The Court of Claims awarded just compensation for the taking of and injury to the Bridge Company's property. The Court awarded respondents $84,375.00, and as a part of just compensation, interest thereon at the rate of four percent per annum from April 18, 1938 to date of

payment (Fdgs. 18-19-20, R. 24-25; Fdg. 28, R. 28; Fdg. 36, R. 35-36; Court's Opinion, R. 54-55).

And on page 3, last paragraph, it is stated, "Included in the judgment was $35,000 representing the cost of rebuilding the wooden bridges, etc." That is inaccurate. That amount covers only the cost of steel spans and supporting piers over Big Slough and Winneshiek Slough adequate to pass the accumulations of ice under conditions subsequent to the raising of pool level to elevation 620 (Fdg. 28, R. 28; Fdg. 36, R. 35-36).

On page 4 of the petition reference is made to the land barriers. These land barriers (bars) were left on each side of Big Slough and on the south side of Winneshiek Slough. These provided natural ground barriers between the ends of the borrow pits and the slough banks. At river stages below elevation 620, the operation of the dam in keeping the pool at elevation 620 caused a transverse flow of water along the dike and into the sloughs. The barriers had a top elevation of slightly under 620. At times of ordinary high water at 616.5 prior to the operation of the dam, no water flowed across these barriers and they remained in good condition. After the dam was placed in operation, they were washed out by the transverse flow caused by the operation of the dam. The contention in regard to navigability did not relate to the land barriers (Fdg. 19, R. 25; Fdg. 36, R. 35-36; Court's Opinion, R. 41-42).

In the petition, bottom page 4 and top page 5, it is asserted, "The Court of Claims avoided the Government's contention by limiting the Mississippi River to the channel maintained by the United States for commercial navigation." That is not correct. The facts show that there was only one channel. Big Slough and Winneshiek Slough are sloughs which in fact are non-navigable and have been so known through the ages (Fdgs. 6-7, R. 19-20; Fdg. 13, R. 22-23).

RESPONSE TO PETITIONER'S BRIEF ENTITLED "REASONS FOR GRANTING THE WRIT".

(Petition, pages 5 to 14.)

SUMMARY OF ARGUMENT.

At the site of the Bridge Company's property the Mississippi River is 1200 feet wide from bank to bank. The natural banks of the river are the limits of the navigable river.

The valley or bottom land extending 2½ miles from the East bank of the Mississippi River to a point near De-Soto, Wisconsin, crossed by Big Slough, Winneshiek Slough and other sloughs, is not part of the Mississippi River.

The lands crossed by the Bridge Company's roadway and trestle bridges are part of lands which were patented by the United States to the State of Wisconsin and individuals, respondent's predecessors in title.

Under the law of Wisconsin the respondent Bridge Company owned the beds of the sloughs in its right-of-way, and both under the common law and statute law of Wisconsin it had the right to erect and use the bridges. That was a property right. Such a right recognized as private property by the law of a state is one which cannot be taken without just compensation under the Constitution of the federal government.

The servitude of privately owned lands forming the banks and bed of a stream to the interests of navigation is a natural servitude, confined to such streams as, in their ordinary and natural condition, are navigable in fact, and confined to the natural condition of the stream.

The Big Slough bridge is 1000 feet from the Mississippi River and Winneshiek Slough bridge is nearly a mile from the Mississippi River. Neither bridge was near the banks of the Mississippi River. They crossed the sloughs which

are non-navigable in fact. Those sloughs in the Bridge Company's right-of-way are not subject to any navigation servitude.

The fact that water of a stream comes from a navigable river and returns to navigable water, does not make such stream navigable. To be navigable it must be navigable in fact, or susceptible of being used in its ordinary condition as a highway of commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. To be navigable in law the stream must be navigable in fact.

The decision of the Court of Claims is fully sustained by the prior decisions of this Honorable Court and by an unbroken line of decisions of the federal and state courts, and the petition for writ of certiorari should and ought to be denied.

ARGUMENT.

In the brief part of the petition under heading "Reasons for Granting Writ" (pages 5 to 14) various assumed fact assertions are made without citation to the record. Such assumed fact assertions are *dehors the record* and immaterial.

THE MISSISSIPPI RIVER IS 1200 FEET WIDE FROM BANK TO BANK.

At the site of the Bridge Company's property the Mississippi River is approximately 1200 feet wide from bank to bank. The valley land extending approximately 2½ miles from the east bank of the Mississippi River to a point opposite near DeSoto, Wisconsin, crossed by Winneshiek Slough, Big Slough and other sloughs (Fdgs. 6 and 7, R. 19-20), is not part of the Mississippi River.

In *Cleveland, C., C & St. L. Ry. v. Mumford* (Ind. 1935), 197 N.E. 826, at 830-831 the Court said:

"Appellants contend that the Wabash river extends to the highest floodwater boundaries in the valley; that all of the valley which is covered by water in times of flood is part of the navigable stream; and that therefore, before any levee or other obstruction can be built in any part of the valley which is submerged in times of flood or high water, authority of Congress must be procured. Appellees, on the contrary, contend that the natural banks of the river are the limits of the navigable stream, and that the valley into which it occasionally overflows is not part of the stream, and that levees, dikes, and other structures may be built therein without authority of Congress.

"It is well known that the Wabash and other rivers of Indiana have at certain times overflowed their banks and inundated many miles of farm land and parts of cities and towns. It is inconceivable that the federal statutes above referred to were intended to vest in Congress jurisdiction to determine whether or not structures which would tend to impair the flow of water might be constructed upon any of the land which was inundated by the floods of 1913. Such a construction would preclude the erection of homes, business buildings, and even public buildings, in many cities, upon land that no one had ever dreamed of considering part of the river bed. This is clearly beyond the obvious purposes of the legislation.

"In Cubbins v. Mississippi River Commission (1916), 241 U.S. 351, * * * It is said on page 367: * * * 'Indeed, from the fact of the bill it is apparent that the rights relied upon were assumed to exist upon the theory that the valley through which the river travels, in all its length and vast expanse, with its great population, its farms, its villages, its towns, its cities, its schools, its colleges, its universities, its manufactories, its network of railroads,—some of them transcontinental,—are virtually to be considered from a legal point of view as

constituting merely the high-water bed of the river, and therefore subject, without any power to protest, to be submitted to the destruction resulting from the overflow by the river of its natural banks.'

"It was concluded that the property in the valley outside of the normal bed of the stream is not a part of the bed of the river, and that hence construction of a levee in such valley lands to deflect 'accidental' water does not constitute an interference with the stream or its natural flow.

"The channels of navigable streams are reserved to the United States, but the lands outside the ordinary banks of the river over which flood waters may flow are privately owned; some at least of those in the case at bar were expressly granted to the state of Indiana by the United States as swampland, with authority to drain and redeem and sell to private owners. Such lands inundated at high water *cannot rationally be considered as part of the bed of a navigable stream, notwithstanding the water which flows over them is part of the waters of the stream.*" (Emphasis supplied.)

THE BRIDGE COMPANY OWNS THE LAND CROSSED BY ITS TRESTLE BRIDGES.

The lands crossed by the Bridge Company's roadway and trestle bridges are part of lands which were patented by the United States to the State of Wisconsin and to individuals, respondent's predecessors in title[1] (Fdg. 13, R. 22).

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[1] The patents to the State of Wisconsin were granted pursuant to an Act of Congress approved September 28, 1850, entitled "An Act to Enable the State of Arkansas and Other States to Reclaim the Swamp Lands within their limits." The State of Wisconsin, on July 7, 1895, issued a patent covering the same lands to plaintiff's predecessors in title. The remaining lands in question were patented to plaintiff's predecessors in title under two acts of Congress, entitled "An Act Making Further Provisions For the Sale of Public Lands," approved April 24, 1820, and "To secure Homesteads to Actual Settlers on the Public Domain," approved May 20, 1862. Two of the patents were issued in 1921, and the third in 1927 (Fdg. 3, R. 22).

In Wisconsin the ownership of riparian proprietors extends to the center or thread of the stream, subject, if such stream be navigable, to the rights of the public to use it as a public highway for the passage of vessels, and if it be non-navigable, without qualification.

In *Kaukauna Water-Power Co. v. Green Bay & M. Canal Co.*, 142 U.S. 254, the Court said:

> "It is the settled law of Wisconsin, announced in repeated decisions of its supreme court, that the ownership of riparian proprietors extends to the center or thread of the stream, subject, if such stream be navigable, to the right of the public to its use as a public highway for the passage of vessels. Jones v. Pettibone, 2 Wis. 208; Walker v. Shepardson, Id. 384, 4 Wis. 486; Norcross v. Griffiths, 65 Wis. 599, 27 N.W. Rep. 606. In City of Janesville v. Carpenter, 77 Wis. 288, 46 N.W. Rep. 128, it is said of the riparian owner: 'He may construct docks, landing places, piers, and wharves out to navigable waters, if the river is navigable in fact; but, if it is not navigable, he may construct anything he pleases to the thread of the stream, unless it injures some other riparian proprietor, or those having superior right to use the waters for hydraulic purposes, * * * Subject to these restrictions, he has the right to use his land under water the same as above water. It is his private property, under the protection of the constitution, and it cannot be taken, or its value lessened or impaired, even for public use, 'without compensation,' or 'without due process of law;' and it cannot be taken at all for anyone's private use.' With respect to such rights, we have held that the law of the state, as declared by its supreme court, is controlling as a rule of property." (Citing.)

Respondent's predecessors in title owned the beds of the sloughs and had full riparian rights and these were included in the conveyances to the Bridge Company of the right-of-way. In the deeds to the Government for Upper

Mississippi River Wild Life and Fish Refuge the right-of-way was reserved and excepted across the various sloughs (Fdg. 13, R. 22; Fdgs. 29 to 35, inclusive, R. 29-35 inclusive).

Title of the United States to land underlying navigable waters within the state passes to state as incident to transfer of local sovereignty to state and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce, but the title of the United States to land underlying waters not navigable in fact remains unaffected. The title to land under non-navigable waters passes from the United States to the grantees of the upland bounding on such non-navigable waters as an incident to such grant. *United States v. State of Oregon*, 295 U.S. 1; *Hardin v. Jordan*, 140 U.S. 371; *Griffith v. Holman*, 23 Wash. 347, 54 L.R.A. 178, at 181-182; *Lamprey v. Metcalf*, 52 Minn. 181, 53 N.W. 1139, 18 L.R.A. 670, 38 Am.St.Rep. 541.

BIG SLOUGH AND WINNESHIEK SLOUGH ARE NON-NAVIGABLE. THE POINTS IN QUESTION ARE ON THESE NON-NAVIGABLE SLOUGHS.

The defendant contended before the Court of Claims, "The Mississippi River is and was a navigable river at the times and points in question. The two sloughs traversed by the damaged bridges (Winneshiek Slough and Big Slough) are a part of the river. They actually carry a portion of the total flow. The sloughs lead off from the main channel of the river and return to the main channel." etc. (Court's Opinion, R. 51-52).

The Mississippi River is a navigable river, but the points in question are not on the Mississippi River. The natural banks of the river are the limits of the navigable stream. The property in the valley outside of the normal bed of the stream is not a part of the bed of the river.

Gould on Waters (3d Ed.) Section 45, in discussing this question, says:

> "The banks are the elevations of land which confine the waters in their natural channel when they rise the highest and do not overflow; and in that condition of the water the banks and the soil which is permanently submerged form the bed of the river. The banks are a part of the river bed, but the river does not include lands beyond the banks which are covered in times of freshets or extraordinary floods."

Woolrych defines a river to be a body of flowing water of no specific dimensions—larger than a brook or rivulet, less than a sea—a running stream, pent on each side by walls or banks. Cited in *Alabama v. Georgia*, 23 How. 505.

With reference to channel of a river the Century Dictionary and Encyclopedia defines it as follows:

> "(1) channel * * * the bed of a stream; the hollow or course in which a stream flows. (2) the deeper part of a river * * * where the current flows or which is most convenient for the track of a ship."

In *American Red Cross v. Hinson*, 173 Tenn. 667, in a proceeding under the Tennessee Workmens Compensation Law by the widow of an employee of the American Red Cross seeking an award against the organization and its insurer on account of the death of her husband, there was a judgment for the plaintiff. The deceased was employed by the Memphis office of the American Red Cross as a rescue worker during the 1937 flood. Just previous to decedent's death, with others he was ordered from the Mississippi side of the Mississippi River to proceed over to the Arkansas side about matters connected with his employment. They crossed the river in a boat. After reaching the Arkansas side the boat became entangled in drift wood and, in an effort to get the boat out it was overturned and petitioner's husband was drowned. The defendant insisted

that the accident occurred on navigable waters of the United States, and that the suit was, therefore, not maintainable under the Tennessee Compensation Statutes. That any recovery must be had under the Federal Longshoreman and Harbor Worker's Compensation Act. The accident occurred within the levee district on the Arkansas side but some distance from the bank of the river at a point ordinarily dry, not covered with water except in flood times.

At page 671 the Court said:

> "There was no proof that the river reached the point of this accident with any periodicity or regularity. Petitioner's proof was to the effect that the river got so high only in flood times. We think, therefore, that the evidence abundantly justified the finding of the circuit judge that deceased met his death on overflowed land *rather than upon navigable waters.*" (Emphasis supplied.)

It will be noted that navigability is confined to the Mississippi River. The fact that the water comes from the Mississippi River and returns to it does not make navigability.

In *United States v. Ross* (1947), 74 Fed. Supp. 6, the defendant was charged with criminally operating a motor boat on navigable waters of the United States in violation of Section 526m, Title U.S.C.A. A levee was built along the west side of the Mississippi River from a borrow pit on the east side of the levee between the levee and the Mississippi River. The pit extended for several miles parallel to the river varying in width from 50 to 200 feet and in distance from the Mississippi River 10 to 100 feet, and had 2 openings on the river 6 feet wide and 20 feet long, and at normal stages a depth of 3 feet which increased or decreased as the stage of the river changed. The pit was 6 or 7 feet at maximum depth. At flood stage of the Mississippi River it was submerged. Defendant had a dock on

the pit which he and his father used during duck seasons and other occasions. He had a boat 20 feet long, 5 feet wide, 18 inches deep, powered by a motor with which he transported hunters to an island in the Mississippi River. He had loaded his boat with 10 duck hunters and had proceeded 100 feet when it sunk, resulting in the death of 3 passengers and the pending charge. The Court said:

> "As we read the authorities whether waters are navigable so as to give United States jurisdiction depends on whether they are navigable in fact and they are navigable in fact when they are used, or are susceptible of being used, in the ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water." (The Court then reviews the authorities.)

The Court held the borrow pit to be non-navigable and that the Federal Court did not have jurisdiction, and dismissed the case.

The fact that the water came from and returned to the Mississippi River did not make the borrow pit navigable. It could only be navigable if it met the tests of navigability.

In *Kerr v. West Shore R. Co.*, 127 N.Y. 269, 27 N.E. 833, 835, the Court held that a bay off a navigable stream was not navigable in the ordinary meaning of the term and that because a vessel of light draft might at certain stages of the tide get nearer to the shore by use of the bay "does not make it, in a general sense, a navigable part of the river."

In *Mintzer et al. v. North American Dredging Co.*, 242 Fed. 553, affirmed (9 C.C.A.) 245 Fed. 297, wherein a slough was held non-navigable, the Court said:

> *"The fact of navigability must be established by evidence, and the burden of proof rests on the party asserting that character.* Harrison v. Fite, 148 Fed. 781, 78 C.C.A. 447. The mere depth of water will not

place a stream in the category of a navigable waterway, other essentials being absent;" (Emphasis supplied.)

The Court further said:

"Nor does the evidence show that the channel is or will be in any true sense useful to the public for the purpose of navigation. It is true it is now within the corporate limits of the city of Richmond, which in that sense may be said to constitute a public terminus. But, as the evidence shows, it lies only at its 'back door,' so to speak, runs wholly through private property, and is so situated that its use is, and so far as appears can be, available only to the Oil Company and Belt Railroad, should the latter see fit to construct an approach. It is not accessible or available to the public, nor to any other private industry; the evidence showing that the nearest established street of the town is at least a quarter of a mile from its southern terminus. Under the principles above stated, I am satisfied that the court *would not be* justified upon the facts in holding this channel to be a navigable stream." (Emphasis supplied.)

Leovy v. United States, 177 U.S. 621, involved the question of the navigability of Red Pass. The Court referred to Red Pass thus:

"Which said Red Pass flows in the Gulf of Mexico from a certain navigable stream of the United States, known as the Jump, which said Jump is an outlet of the Mississippi River into the Gulf of Mexico."

There waters of the Mississippi River flowed from an outlet of the Mississippi River into the stream known as the Jump through Red Pass into the Gulf of Mexico. The fact that the water came from a navigable river and returned to navigable waters did not make Red Pass navigable. Red Pass had to meet the tests of navigability, and it was held non-navigable.

In that case a few fishermen testified that they occasionally went through Red Pass with vessels carrying oysters for planting, and one or two cargoes of willows and timber had passed through it, but had not been used for interstate commerce. The Court in referring to the instructions of the trial court said:

> *"If those instructions were correct, then there is scarcely a creek or stream in the entire country which is not a navigable water of the United States. Nearly all the streams on which a skiff or small lugger can float discharge themselves into other streams or waters flowing into a river which traverses more than one state, and the mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, the jury is informed, is sufficient to constitute a navigable water of the United States.* (Emphasis supplied.)
>
> "Such a view would extend the paramount jurisdiction of the United States over all the flowing waters in the states, and would subject the officers and agents of a state, engaged in constructing levees to restrain overflowing rivers within their banks, or in regulating the channels of small streams for the purposes of internal commerce, to fine and imprisonment, unless permission be first obtained from the Secretary of War. If such were the necessary construction of the statutes here involved, their validity might well be questioned. But we do not so understand the legislation of Congress. When it is remembered that the source of the power of the general government to act at all in this matter arises out of its power to regulate commerce with foreign countries and among the states, it is obvious that what the Constitution and the acts of Congress have in view is the promotion and protection of commerce in its international and interstate aspect, and a practical construction must be put on these enactments as intended for such large and important purposes.

"We also think that these instructions are open to the further criticism that they contain no reference to the nature or extent of the traffic or trade carried on in Red Pass before the erection of the dam. Indeed, the charge necessarily implies that the defendant was guilty if there was merely a capacity for passing from Red Pass into the Mississippi river on any sort of a boat. Very different was the view expressed by Chief Justice Shaw when he said it is not 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable.' But in order to give it the character of a navigable stream it must be generally and commonly useful to some purpose of trade or agriculture. *Rowe v. Granite Bridge Corp.*, 21 Pick. 344."

Healy v. Joliet & C. R. R. Co., 116 U.S. 191, affirming 94 Illinois 416. This was a suit for an abatement, or other appropriate relief, against a railroad bridge across Healy Slough built by the defendant and claimed to be an obstruction to the navigation of the slough; that it obstructed the access of vessels coming from Lake Michigan or from the Chicago River through that river and through the slough. It was claimed that this slough at the point where the bridge was built was a navigable water of the United States. The Supreme Court of the United States affirmed the decision of the Supreme Court of the State of Illinois holding the slough non-navigable.

In *Rowe v. Granite Bridge Corp.*, 21 Pick. 344, the Court, speaking through Chief Justice Shaw, said:

"It is not every ditch, in which the salt water ebbs and flows, through the extensive salt marshes along the coast, and which serve to admit and drain off the salt water from the marshes, which can be considered a navigable stream. Nor is it every small creek, in which a fishing skiff or gunning canoe can be made to float, at high water, which is deemed navigable. But in order to have this character, it must be navigable

to some purpose, useful to trade or agriculture. It is not a *mere possibility of being used* under some circumstances, as at extraordinary high tides, which will give it the character of a navigable stream, but *it must be generally and commonly useful* to some purpose of trade or agriculture." (Emphasis supplied.)

In *Wethersfeld v. Humphrey*, 20 Conn. 218, in passing upon the question of whether certain waters were navigable, after reciting the fact that at times a fish boat, or skiff, or Indian canoe might have been pushed through the waters, said:

> "But this is not navigation. That only is such, and those only are navigable waters, where the public pass and repass upon them, with vessels or boats, in the prosecution of useful occupations. *There must be some commerce or navigation which is essentially valuable.*" (Emphasis supplied.)

In *Nutter v. Gallagher*, 19 Or. 375, 24 Pac. 250, it is held that a stream or watercourse, in order to be navigable, must be of sufficient extent and capacity to enable *the community at large* to utilize it in the navigation of boats and other water craft thereon for *the transportation of products and other merchandise*, or for the purpose of floating logs and timber from forests to market.

In *Asselin v. Blount, et al.*, 65 Rhode Island Reports 293, at 297 the Court said:

> "Rivers are navigable in fact if they are susceptible of use in their 'ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.' *The Daniel Ball*, 10 Wall. 557, 563. But it is not every creek in which a fishing skiff can float at high water that is navigable. It must be generally and commonly useful to purposes of trade and commerce. *Rowe v. Granite Bridge Corp.*, 21 Pick. 344."

In *Harrisan et al. v. Fite* (8 C.C.A.), 148 Fed. 781, the Court said:

> "To meet the test of navigability as understood in the American law a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient. While the navigable quality of a water course need not be continuous, yet it should continue long enough to be useful and valuable in transportation; and the fluctuations should come regularly with the seasons, so that the period of navigability may be depended upon. Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable a water course must have a useful capacity as a public highway of transportation."

THE BIG SLOUGH BRIDGE IS 1,000 FEET FROM THE MISSISSIPPI RIVER AND THE WINNESHIEK SLOUGH BRIDGE IS NEARLY A MILE FROM THE MISSISSIPPI RIVER. NEITHER BRIDGE IS NEAR THE BANK OF THE RIVER.

The servitude of privately owned land forming the banks and bed of a stream to the interests of navigation is confined to such streams as, in their ordinary and natural condition are navigable in fact and confined to the natural condition of such streams.

United States v. Cress, 243 U.S. 316, covered two cases. In No. 84 at the time of the erection of Lock and Dam No.

21 in the Cumberland River, the plaintiff was the owner of 189 acres of land on Whiteoak Creek, a tributary of the Cumberland, not far distant from the river; and by reason of the erection of the lock and dam 6.6 acres of his land were subject to frequent overflow of water from the river so as to depreciate it to one-half its value, and a *ford across Whiteoak Creek and a part of a pass* way were destroyed. The damage to the land was $495 and the damage to the land by the *destruction of the ford* was $500. Whiteoak Creek was non-navigable. In cause No. 718 at the time of the erection by the Government of Lock and Dam No. 12 in the Kentucky River the plaintiffs and another, who was made a defendant, were owners in possession of a tract of land situated on Miller's Creek, a branch of the Kentucky, containing 5½ acres upon which there was a mill and a mill seat. By reason of the erection of the lock and dam the mill could no longer be driven by water power. The water above the lock and dam when it was at pool stage was about one foot below the crest of the mill dam and prevented the drop in the current necessary to run the mill. No part of the land or mill was overflowed or covered by pool stage of water nor was the mill physically damaged thereby. Miller's Creek is a non-navigable river. The damages sustained by the owners of the mill represented depreciation of the value of the mill property by cutting off of the water power amounting to $1,500. The Court said:

> "It has become well established that the test of navigability in fact is to be applied to the stream in its natural condition, not as artificially raised by dams or similar structures; that the public right is to be measured by the capacity of the stream for valuable public use in its natural condition; that riparian owners have a right to the enjoyment of the natural flow without burden or hindrance imposed by artificial means, and no public easement beyond the natural

one can arise without grant or dedication save by condemnation, with appropriate compensation for the private right. * * *

"Many state courts, including the court of appeals of Kentucky, have held, also, that the legislature cannot, by simple declaration that a stream shall be a public highway, if in fact it be not navigable in its natural state, appropriate to public use the private rights therein without compensation. (Citing cases.) * * * This court has followed the same line of distinction. That the test of navigability in fact should be applied to streams in their natural condition was in effect held in The Daniel Ball, 10 Wall. 557, 19 L.Ed. 999,— * * *

"Pumpelly v. Green Bay & M. Canal Co., 13 Wall. 166, 20 L.ed. 557, involved the right to compensation for land overflowed with backwater from a dam erected and maintained in the Fox river, under authority of the state of Wisconsin, for the improvement of navigation. (A permissible exercise of state power, in the absence of action by Congress, although it was an interstate navigable water. Willson v. Black Bird Creek Marsh Co., 2 Pet. 245, 251, 7 L.ed. 412, 414; Gilman v. Philadelphia, 3 Wall. 713, 18 L.ed. 96.) The raising of the river above its natural stage, by means of an artificial structure, was the gravemen of the complaint. It was argued (p. 174) that the state might, in the interest of the public, 'erect such works as may be deemed expedient for the purpose of improving the navigation and increasing usefulness of a navigable river, without rendering itself liable to individuals owning land bordering on such river, for injuries to their lands resulting from their overflow by reason of such improvements.' This court overruled the contention, and held there was taking without compensation, contrary to the applicable provision of the Constitution of Wisconsin. * * *

"It follows from what we have said that the servitude of privately-owned lands forming the banks and

bed of a stream to the interests of navigation is a natural servitude, *confined to such streams as, in their ordinary and natural condition, are navigable in fact, and confined to the natural condition of the stream.* * * * (Emphasis supplied.)

"But the authority to make such improvement is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power, like others, must be exercised, when private property is taken, in subordination to the 5th Amendment. Monongahela Nav. Co. v. United States, 148 U.S. 312, 336, 37 L.ed. 463, 471, 13 Sup. Ct. Rep. 622; United States v. Lynah, 188 U.S. 445, 471, 47 L.ed. 539, 546, 549, 23 Sup. Ct. Rep. 349. And we deem it clear that so much of the properties of the respective defendants in error as was unaffected by the flow of the rivers or their tributaries prior to the construction of the locks and dams in question was private property, and not subject to be overflowed, without compensation, in the raising of the level of the rivers by means of artificial dams. * * *

"That overflowing lands by permanent backwater is a direct invasion, amounting to a taking, is settled by Pumpelly v. Green Bay & M. Canal Co., 13 Wall. 166, 177, 20 L.ed. 557, 560; United States v. Lynah, 188 U.S. 445, 468-470, 47 L.ed. 539, 547-549, 23 Sup. Ct. Rep. 349. It is true that in the Pumpelly Case there was an almost complete destruction, and in the Lynah Case a complete destruction, of the value of the lands, while in the present case the value is impaired to the extent of only one half. *But it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.* * * * (Emphasis supplied.)

"In No. 84 some question is made about the allowance for the damage to the land by the *destruction of the ford across Whiteoak creek* and the pass way, but we deem the objection unsubstantial. It is said there is nothing to show how Cress acquired ownership of

> *the ford,* and that it does not appear that he had a right to pass over the adjoining land of one Brown. It seems to us, however, that the findings, while meager, sufficiently import that Cress had a right to a *private way and ford* as appurtenant to his land, and that the damage to the land by the destruction of the *ford* was $500. This brings the case squarely within United States v. Welch, 217 U.S. 333, 339, 54 L.ed. 787, 789, 28 L.R.A. (N.S.) 385, 30 Sup. Ct. Rep. 527, 19 Ann. Cas. 680, and United States v. Grizzard, 219 U. S. 180, 184, 185, 55 L.ed. 165-167, 31 L.R.A. (N.S.) 1135, 31 Sup. Ct. Rep. 162." (Emphasis supplied.)

There the defendant had a ford across non-navigable Whiteoak creek, here the respondent had trestle bridges across the non-navigable sloughs.

Toledo Liberal Shooting Co. v. Erie Shooting Club (6 C. C.A.), 90 Fed. 680. This case involved the navigability of Maumee Bay, a bay or arm off Lake Erie. These submerged lands were surveyed and platted and patented to the State of Michigan under the Swamp Land Act of 1850. The Erie Shooting Club had acquired by lease all the submerged land of the bay of about 4,000 acres except 106 acres in the center of the bay which was held under lease by the Toledo Liberal Shooting Company. The Erie Shooting Club sought to enjoin the Toledo Liberal Shooting Company from using the bay. The Toledo Club answered that the lands were navigable waters and denied any exclusive right of the Erie Club to navigate said waters. The bay was of sufficient depth for navigation where it opened into Lake Erie. In an opinion by Justice LURTON the Court held the bay non-navigable. The Court at page 681 said:

> "The fact that this so-called 'bay' was surveyed and platted as swamp land by the government affords a strong presumption against the navigability of the water thereon. This survey was under the authority

of the government, which subsequently conveyed the lands so platted to the state of Michigan as swamp lands, under the act of September, 1850, known as the 'Swamp Land Act.' That the state subsequently conveyed them is a further circumstance tending to establish that no public easement had or could exist therein by reason of the navigability of the waters thereon.

"Just where the so-called 'bay' opens into the lake, at its southeast end, there is water navigable for ordinary commercial purposes. This channel rapidly shallows as the bay is penetrated. * * *

And at page 682:

"None of the characteristics of commercial navigability are shown here. It is the natural feeding ground of the duck and other water fowl. In their pursuit by canoe and flat-bottomed ducking boats the water may be navigated. That is not commerce, and proves nothing. The same test would convert every pond and swamp capable of floating a boat into a navigable stream or lake. This bay is not a highway, never has been, and can never be. At the common law the term 'navigable' had a technical meaning, and was applied to all streams or bodies of water in which the tide ebbed and flowed. All such waters were public. That definition is not applicable in this country, and all waters are held navigable in law, and subject to a public use, which are by their character capable of use as highways, for purposes useful to trade or agriculture. It is the capability of being navigated for useful purposes which is the test." (Citing cases.)

Even though the waters of the bay came from Lake Erie that didn't make it navigable.

On page 5 of the petition it is asserted in substance that the decision in *United States v. Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592 is contra to the decision of the Court of Claims in this case (R. 51-55). That assertion

is without foundation. The Milwaukee case related to the Mississippi River, not to non-navigable sloughs; it related to the bed of the Mississippi River.

In the Milwaukee Case the tracks of the respondents' railroad and the poles of the telegraph companies in Wabasha and Winona counties, Minnesota, were, in part on an embankment on the westerly side of the Mississippi River. The Government instituted condemnation proceedings to acquire the right to back water across the respondents' right of way and against their embankment. It is stated (p. 594):

> "At the trial in the condemnation proceeding the Government offered to prove that four segments of the embankment lie between the ordinary high and ordinary low water marks of the *river;* are, therefore, subject to the federal power to improve navigation;" (Emphasis supplied.)

Respondents objected to the offer as immaterial for the reason that neither before or after the improvement did the embankment constitute an obstruction or menace to navigation, and that its maintenance was, therefore, a right of private property, the injury to which entitled the owner to compensation. The offered proof was rejected. A judgment was entered for damages to the entire length of the embankment. Each party appealed. Thereafter by stipulation all questions except that touching the four segments of the embankment which the Government claimed were located between high and low water marks were eliminated from the cause and it was stipulated by the respondents that one of the four segments was so located. The Court said at page 596:

> "The bed of a river is 'that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and

mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn.' "

Citing *Alabama v. Georgia*, 23 How. 505, from which the definition was taken which involved the delineation of the boundary line between Alabama and Georgia along the west bank of the Chattahoochee river and not of sloughs, tributaries or bayous. The definition is evidently used in the same sense in the *Milwaukee* Case. The Court said at 596-597:

"The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. The damage sustained results not from a taking of the riparian owner's *property in the stream bed*, but from the lawful exercise of a power to which that property has always been subject." (Emphasis supplied.)

It will be noted that the Court said "property in the stream bed." That in that case was in the bed of the Mississippi River; it did not refer to anything else. The Court further said at 597:

"What was said in the Cress case must be confined to the facts there disclosed. In that case, the Government's improvement in a navigable stream resulted in the flooding of the *plaintiff's land in and adjacent to a non-navigable stream*. The owners of the land *along and under the bed of the stream* were held entitled to compensation for the damage to their lands. The question here presented was not discussed in the opinion." (Emphasis supplied.)

It will be noted that the Court said: "The question here presented was not discussed in the opinion." Neither was the question in the Cress case presented or involved in the Milwaukee case. The Court makes it very clear that the question involved in the Milwaukee case is wholly different than the one involved in the Cress case. The question in the Milwaukee case related to the navigable Mississippi River while the one in the Cress case related to a non-navigable stream, the same as the question presented in the instant case relates to the non-navigable sloughs.

The Court in the Milwaukee case did not pass on the navigability of non-navigable sloughs nor on the navigability of a tributary. The Court on page 599 of the opinion states:

> "The respondents claim that two of the sections of embankment in question not only are above ordinary high water mark but also claim that they abut, not on the Mississippi River, but on a non-navigable tributary and that another, though along the bank of the river, is at or above the ordinary high water line. The Government disagrees. These issues of fact remain for solution by the District Court.
>
> "The judgment is reversed and the cause is remanded to the District Court for further proceedings in conformity with this opinion. So ordered."

On page 6 of the petition it is asserted the Court "denied the United States its navigation servitude over these channels." Such servitude never existed. The Sloughs, erroneously called channels, were never navigable.

United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, cited by petitioner, involved the water power right of the defendant in the navigable St. Mary's River and the Court held that such right was subject to the Government's right of navigation. That case has no bearing on the instant case.

Union Bridge Company v. United States, 204 U.S. 364, cited by petitioner, involved a conviction on an information for failing to make alterations of a bridge over an interstate navigable waterway. The bridge was across the navigable Allegheney river. It has no bearing on the instant case.

Monongahela Bridge Co. v. United States, 216 U.S. 177, cited by petitioner, is a criminal case involving criminal conviction for failing to make alterations of a bridge over an interstate waterway, the navigable Monongahela river. It has no bearing on the instant case.

Hannibal Bridge Co. v. United States, 221 U.S. 194, cited by petitioner, is another case involving a review of a criminal conviction for noncompliance with an order to make alterations in a bridge over an interstate waterway, the Mississippi River. It also has no bearing on the instant case.

Louisville Bridge Co. v. United States, 242 U.S. 409, cited by petitioner, involved a decree restraining a bridge company from reconstructing the super structure of its bridge over the Ohio river, a navigable river, contrary to the provisions of an order of the Secretary of War. This also has no application in the instant case.

On page 8 of the petition reference is made to the dissenting opinion of Judge Whitaker in this case. In it Judge Whitaker (R. 56) states, "At the point where these bridges were erected the Mississippi River runs between two high bluffs. The valley between these bluffs is about 2½ miles wide." * * * "When we say that a stream is navigable we mean that it is navigable from bank to bank; not merely that portion of it over which boats pass." The learned Judge apparently means that the Mississippi River extends not only from the bank on the Iowa side to the bank on the Wisconsin side but that it extends also from the east bank of the Mississippi River to a point opposite near

DeSoto, Wisconsin, across the valley lands a distance of 2½ miles and thereby includes the sloughs which is both contra to the facts and the applicable decisions. (Fdgs. 6-7, R. 19-20; Fdg. 13, R. 22-23.) *Cleveland, C., C. & St. L. Ry. v. Mumford* (Ind. 1935), 197 N.E. 826, at 830-831; *Cubbins v. Mississippi River Commission*, 241 U.S. 351, at 367.

The learned Judge also (R. 57) states, "These so-called sloughs are but different channels of the same river, and if the level of the water in the main channel is raised, then the level of the water in the other channels is necessarily raised." The undisputed facts as found by the Court of Claims show that they are sloughs (Fdg. 13, R. 22-23). If the water is raised by a dam in a navigable river it raises the water in non-navigable trubutaries, non-navigable sloughs and non-navigable low lands which are not subject to any navigable servitude.

Private owners of land forming the banks and bed of a non-navigable stream have the right to use their land under water the same as above water. This is a property right which cannot be taken or its value lessened or impaired even for public use without just compensation. *Kaukauna Water-Power Co. v. Green Bay & M. Canal Co.*, 142 U.S. 254.

The majority opinion of the Court of Claims is fully sustained by the decisions of this Court, and the decisions of the Federal Courts and of the Courts of the various states.

United States v. Turner, 175 F. (2) 644, cited by petitioner, involved title to land in navigable Mobile Bay and bears no similarity to the instant case.

On page 7 of the petition it is asserted, "The effect of the decision below is that where the Government elects to improve one of several channels of a navigable river, the channel selected for improvement becomes the navigable river, and the remaining channels are released from

the paramount navigation servitude." * * * This assertion is without foundation. It is based on the fallacious assumption that there is more than one channel navigable in fact, or susceptible of being used in its ordinary condition as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. *Leovy v. United States*, 177 U. S. 621. No such facts exist in the instant case. There was nothing to elect.

The sloughs have never served any useful commercial or travel purpose; in fact there are no such purposes to be served. There is no evidence that they are capable or susceptible of being so used, and they are in fact non-navigable (Fdg. 13, R. 22-23, and Court's Opinion, R. 53). Such is the undisputed record.

The burden was on the Government to prove that Big Slough and Winneshiek Slough were navigable, *Harrison v. Fite*, 8 Cir. 148 Fed. 781, 78 C.C.A. 447; *Mintzer v. North American Dredging Co.*, 242 Fed. 553, affirmed 9 C.C.A., 245 Fed. 297; 45 *Corpus Juris* 418, Sec. 18; *Burns v. Crescent Gun & Rod Club*, 116 La. 1038, 41 So. 249; *McClusky v. Meraux Nunez*, La. App., 186 So. 117, 119; *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439; *Jones v. Johnson*, 6 Tex. Civ. App. 262, 25 S.W. 650; *McKinney v. Northcutt*, 114 Mo. App. 146, 89 S.W. 351; *Olive v. State*, 86 Ala. 88, 5 So. 653, 4 L.R.A. 33; *Morrison v. Coleman*, 87 Ala. 655, 6 So. 374, 5 L.R.A. 384; *Burner v. Nutter*, 77 W.Va. 256, 87 S.E. 359.

The Government did not prove that either Big Slough or Winneshiek Slough was navigable or capable or susceptible of being so used.

The channel of the Mississippi River has been navigable throughout its entire length for over a century.

As stated in the Court of Claims opinion (R. 53), "The sloughs have never served any useful commercial purpose or travel purpose; in fact there are no such purposes

there to be served. In short, the record contains no facts from which we can conclude that these sloughs are navigable in fact but rather facts which point the other way."

The navigation servitude of privately owned land forming the banks and bed of a stream is confined to such streams as, in their ordinary and natural condition, are navigable in fact, and confined to the natural condition of such streams. *United States v. Cress*, 243 U.S. 316.

The lands crossed by the Bridge Company's roadway and trestle bridges are part of the lands which were patented by the United States to the State of Wisconsin and to individuals, respondent's predecessors in title (Court's Finding 13, R. 22-23), and, neither the Government nor the State of Wisconsin have ever regarded that as a part of the Mississippi River except for the Government's claim in the belated hours of this action.

South Carolina v. Georgia, 3 Otto 4-14, 93 U.S. 4, cited by petitioners, petition page 9, involved the closing of one of the channels of the Savannah River to improve the navigation of the other channel. The Court held that that was not an obstruction to navigation but a means employed to render navigation of the river more convenient. The question of the navigability of either channel was not involved. That case bears no similarity to the instant case and is not in point.

On page 9 of the petition, referring to the Mississippi River, it is asserted: "In the course of the hundreds of miles of navigable length, there are numerous islands of varying size. These islands form obstructions to the flow. As the river approaches such obstructions it divides into two or three or more channels. Such a situation is present in the stretch of the river in suit, etc." This assertion is not sustained by the findings of fact and is contrary to the record.

The petitioner did not request the certification of any

parts of the record other than the pleadings, findings of fact, conclusions of law and judgment, and opinion of the Court, as it could have done under Rule 99 of the Court of Claims and in which event the respondents under said Rule would have had opportunity to request the certification of other parts of the record deemed material by them, such as photographs of the Mississippi River, Exhibits 11-1, 11-2, 11-3, and Government maps, Exhibits 15 and 16, and other parts of the record. But irrespective of that Appendix A (R. 60), which is Defendant's Exhibit 27 (Fdg. 13, R. 23) being a map of the area in question, the original of which has been certified and filed by the petitioner herein, show that the Mississippi River does not divide itself; that its flow is not obstructed by any islands; that there is no island in the Mississippi River. What is designated on the map, Exhibit 27, as islands are formed by and between the sloughs running across the valley lands. The map shows that what is designated as Island 143 is formed by Winneshiek Slough running along one side and Lafayette Slough running along the other side, and the Mississippi River running along the northwesterly end and along the southeast tip. What is designated as Island 151 is formed by Rush Creek and the various branches of the Winneshiek Slough, and what is designated as Island 146 is formed by the Big Slough and its branches and Lafayette Slough, and the Mississippi River runs along one side of it.

Winneshiek Slough and Big Slough have always been designated as sloughs and are so shown on the map, Petitioner's Exhibit 27 (Appendix A, R. 60). They are not channels of the Mississippi River; the record shows that they are sloughs (Fdg. 13, R. 22-23).

That the Congress does not regard a slough navigable simply because some of its water comes from a river is apparent from the fact that Congress passed an Act de-

claring Ollala Slough, Oregon, non-navigable. U.S.C.A. Title 33, Sec. 39. (Feb. 26, 1917, c.119, 39 Stat. 937.)

That the Congress does not regard a stream navigable because its water comes from a navigable river and returns to such river is apparent from the fact that Congress passed an Act declaring the west branch of the Mississippi River flowing between Grand Island and the mainland opposite the City of LaCrosse, State of Wisconsin, and known as the West channel, non-navigable. U.S.C.A. Title 33, Sec. 35. (Feb. 23, 1901, c.470, 31 Stat. 804) There Grand Island was situated in the Mississippi River and what is called West Channel ran along the west side of the Island. There Congress determined that the west branch known as the West Channel had to stand its own test of navigability.

On page 11 of the petition it is stated: "Big Slough was 148 feet wide and Winneshiek Slough was 250 feet wide." Mere width or depth of water, without profitable utility, will not render a water course navigable in the legal sense so as to subject it to public servitude. *Toledo Liberal Shooting Co. v. Erie Shooting Club* (6 C.C.A.), 90 Fed. 680; *Harrison et al. v. Fite*, 148 Fed. 781.

On page 11 of the petition, reference is made to the closing dams across the entrance to Winneshiek and Big Sloughs. These were maintained for the purpose of restricting the water at lower stages to the Mississippi River in order to maintain greater depth of water in that river (Fdg. 23, R. 26). It is evident that the sloughs were regarded as non-navigable.

On page 11 of the petition it is asserted: "The Government might have selected Winneshiek or Big Slough for development as the navigation channel, at the expense of what is now the main channel." There is no merit in that assertion. There was no such selection to be made; nature had provided the Mississippi River channel as the only navigable stream. The sloughs were not navigable

nor susceptible of such use (Fdg. 13, R. 22-23) and were not subject to any navigation servitude.

On pages 11 and 12 of the petition it is sought to put a captious and distorted construction on the Court's finding No. 11 (R. 21), which was never intended by the Court. The Court did not define the Mississippi River at the location of the dam. The term from "shore to shore" means nothing more than from "bank to bank." The finding shows that the concrete dam extends from the bank on the Wisconsin side across the Mississippi River to the bank on the Iowa side, and that the earthen section extends from the west bank of the Mississippi River on the Iowa side a distance of 9,300 feet to the west side of the valley, but that does not mean that the valley and its sloughs are part of the Mississippi River. *Cleveland, C., C. & St. L. Ry. Co. v. Mumford* (Ind. 1935), 197 N.E. 826, cited and quoted from supra this brief, pages 9 to 10; *Cubbins v. Mississippi River Commission* (1916), 241 U.S. 351 at 367. The findings of the Court as to the Mississippi River and the Sloughs at the location of the Bridge Company's property are clear and unambiguous (Fdgs. 6, 7, R. 19-20; Fdgs. 12, 13, R. 22-23).

On page 13 of the petition it is asserted, "There are hundreds, if not thousands, of instances where the great rivers of this country divide into multiple channels by reason of islands in the path of flow." No record citation is given and the assertion is outside the record. Reference is made to surveys by the War Department and House Documents not part of the record in this case. They are incompetent, irrelevant and immaterial. Such surveys and reports are not determinative of navigability. In *State of Oklahoma v. State of Texas*, 258 U.S. 574, it is held that where the surveying officers surveying the lands ran a meander line along the river bank did not make the river navigable because those officers were not clothed with the

power to settle questions of navigability. It was further held that where Congress in permitting the construction of certain bridges across the river in Oklahoma, provided in substance that there should be no interference with navigation that it was manifest that this provision was only precautionary and not intended as affirming navigable capacity of the river in that locality. It was also held that a treaty with a foreign country making a river a boundary and providing that its navigation should be common to the inhabitants of both nations did not establish its navigability. The Court at 586 of the opinion said:

> "We find nothing in any of the matters relied on which take the river in Oklahoma out of the settled rule in this country that navigability *in fact* is the test of navigability in law, and that whether a river is navigable *in fact* is to be determined by inquiring whether it is used, or is susceptible of being used, in its natural and ordinary condition as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." (Emphasis supplied.)

Also, see, *United States v. Chicago, B. & Q. R. Co.*, 90 Fed. (2) 161 at 170-171.

The surveys and house documents referred to nearly all relate to areas removed many miles and some hundreds of miles from the location of the Bridge Company's property. There is nothing in the surveys and documents showing that anyone has ever called the sloughs in question navigable or attributed any navigability to the sloughs. If those documents contained any such statement, such statement would have to yield to the actual situation as found by the Court of Claims. In *State of Oklamoma v. State of Texas*, 258 U.S. 574, at 586-587 the Court said:

> "The evidence bearing on this question is voluminous and in some respects conflicting. A large part

of it deals directly with the physical characteristics of the river, comes from informed sources and is well in point. A small part consists of statements found in early publications, and repeated in some later ones, to the effect that the river is navigable for great distances,—some of them exceeding its entire length. These statements originated at a time when there were no reliable data on the subject, and were subsequently accepted and repeated without much concern for their accuracy. Of course, they and their repetition must yield to the actual situation as learned in recent years."

On pages 13 and 14 of the petition it is stated, "The decision below results in a grave impairment of the sovereign constitutional power to regulate commerce. * * * If the decision below stands, the navigation servitude will be greatly narrowed." * * *Those assertions are without merit. By an unbroken line of authorities the navigation servitude in this country has always been confined to such streams as are navigable in fact and has never been extended to non-navigable streams.

CONCLUSION.

It is respectfully submitted that the petition for writ of certiorari should and ought to be denied.

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March 1950.